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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1440, 73-1441, 73-1442

McBRYDE SUGAR COMPANY, LIMITED, and
OLOKELE SUGAR COMPANY, LIMITED, *Appellants,*

vs.

STATE OF HAWAII, et al., *Appellees.*

SELWYN A. ROBINSON, et al., *Petitioners,*

vs.

STATE OF HAWAII, et al., *Respondents.*

IDA ALBARADO, et al., *Petitioners,*

vs.

STATE OF HAWAII, et al., *Respondents.*

On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writ of Certiorari to the Supreme Court of the State of Hawaii

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RESPONSE TO, JURISDICTIONAL STATEMENT OR, IN THE ALTERNATIVE, PETITIONS FOR WRIT OF CERTIORARI

ARGUMENT

The Supreme Court of Hawaii did not affect the vested rights of the petitioners by their decision.

> "It is universally held that real or immovable property is exclusively subject to a law of the... state in which it is situated, and no interference with it by the law of any other sovereignty is permitted." *Commissioner of Internal Revenue v. Skaggs,* 122 F.2d 721, 723 (1941) Cert. den. 315 U.S. 811, 62 S.Ct. 796, 86 L.Ed. 1210.

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78 (1938).

The Supreme Court of Hawaii, acknowledging the importance of their decision in the case below, said:

> "This Court, like the United States Supreme Court has 'rejected a doctrine of disability at self correction'".[1]

The Supreme Court of Hawaii for the first time construed §7-1, Hawaii Revised Statutes, in determining the rights of the parties to appurtenant, riparian and all surplus waters and clearly defined water rights laws which were in the shaded area as a result of *Territory v. Gay,* 31 Haw. 376 (1930), where the three justices differed on the law.

The Supreme Court of Hawaii, in reaching their decision, reflected back to the time of the *Great*

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[1]All references to appendix made herein refer to "Joint Appendix to Jurisdictional Statement and Petitions for Writs of Certiorari" submitted on behalf of Appellants and Petitioners. Decision (App. 72)

Mahele of 1848, reviewed the decisions made by the same Court in other cases[2], reviewed the principles of the Land Commission before ruling that no one may acquire property to running water in a natural watercourse.

The ancient laws of Hawaii, and Chapter 7, Hawaii Revised Statutes, which was in existence since 1850, make it abundantly clear that the owners of land, having either or both riparian or appurtenant water rights, have the right to the use of the water but no property in the water itself.

This construction of a rule of property, decided by this State's highest tribunal, is binding on all federal courts and should not be overturned.

Moreover a line of decisions may not be a rule of property where it disregards the expression of the statute.

In *Patterson v. McCormick,* 99 S.E. 401, 405 (1919), the Supreme Court of North Carolina was faced with construction of a will which could have been decided adversely to the plaintiffs were it not for a statute which changed the common law. The Court there said:

> "'Where the statute is explicit and has been overlooked, the doctrine of stare decisis does not apply'. . . . When the statute and the precedents conflict the statute controls. The Courts cannot by a line of erroneous decisions overrule the statute."

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[2]See *Peck v. Bailey,* 8 Haw. 658 (1867), *Haw. Com. & Sugar Co. v. Wailuku Sugar Co.,* 15 Haw. 675 (1904), *Carter v. Terr.,* 24 Haw. 47 (1917)

In *Baumann v. Smrha,* 145 F.Supp. 617, 625 (1956), the Court said:

> "There is no vested right in the decisions of a court and a change of decision does not deprive one of equal protection of the laws or property without due process of law.
>
> "Even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without due process of law under the Fourteenth Amendment."

In Re Catherwood's Trust, 173 A.2d 86, 93 (1961) the question presented was the constitutionality of the retrospective application of the Uniform Principal and Income Act with respect to trusts created prior to the date of the Act.

The Court said:

> "Over a century ago the Pennsylvania Rule of Apportionment was created: great and distinguished jurists contributed to its creation and formulation of its principles. The purpose and aim of the Rule was commendable: it sought, and was generally acknowledged to have achieved, an equitable adjustment of the rights of both life tenants and remainderman. Over sixteen years ago, faced with drastic changes in our economy and other factors which rendered unworkable the Rule, the legislature in its wisdom abolished the Rule and substituted a new Rule in its place. Our only task is to determine whether the legislative enactment can constitutionally apply to trusts created prior to its passage.

> *Crawford* found it could not and *Pew and Warden* followed *Crawford*. We have reexamined these decisions and disagree with the results reached. The legislative enactment did not modify or extinguish any vested property rights. There is no vested property rights in a court-made rule of apportionment. The experience under the *Crawford* rule teaches us it cannot justly be applied and, therefore, we overrule *Crawford* followed in *Pew and Warden*."

In much the same manner as the cases cited above there can be no vested property rights in judicial decisions which are contrary to the express wording of a statute which has been in existence in Hawaii since 1850.

An examination of some of the early decisions of this state involving water rights would show why reasonable men should not be allowed to rely on these decisions.

Peck v. Bailey, 8 Haw. 658 (1867) was an opinion by a single justice of the Supreme Court sitting in equity.[3] Basically this case was an action brought by complainants seeking paramount title to the water and relief from defendants' illegal diversion of water to *kula* land.[4] The Court was of the opinion that:

> "[i]f any of the lands were entitled to water by immemorial usage, this right was included in

[3]Chapter XIII, Civil Code 1859, § 827 provided that the Supreme Court shall consist of a Chief Justice and two associates, any of whom may hold the Court. The decision could have been appealed to the full Court.

[4]Land not having ancient water rights in contrast to *kalo* land or taro land having ancient water rights.

> the conveyance (by the King) as an appurtenance." *Supra* at 661.

The Court further reasoned that both parties are:

> "limited in their rights of water, and there is not the slightest ground for declaring either as lords paramount . . . " *Supra* at 663.

As to the issue of transferring water from *kalo* patches to *kula* land, the Court declared that if the use is reasonable and the change does not injuriously affect the rights of others, the transfer is not illegal.

However, the basis for the decision apparently is that the complainants had not sustained the allegation that there had been injury as to them and secondly, if any injury had occurred, the complainant contributed to the deficiency in the Wailuku river by the enlargement of the *Kalaniauwai* (a water course from the Wailuku river).

Moreover the transfer by the defendants was:

> "limited to the same quantity of water to which he was entitled on his *kalo* land by immemorial usage." *Supra* at 666.

There was no basis in law or reason for supposing that any water rights acquired by immemorial usage was included in the conveyance by the King to the tenants as an appurtenant right. Moreover, the decision vacillates from Hawaiian usage concerning water rights to hints of riparian water rights at common law.

All of this occurred seventeen years after the passage of the act governing water rights in Hawaii following the *Great Mahele*.

In *Horner v. Kumuliilii,* 10 Haw. 174 (1895), the Court said:

> "The right to use the water on a certain land . . . being established by prescription gives the owner of the land so far forth the right to use that water as he chooses, and he may allow part of it or all of it to be used elsewhere, provided this diversion does not injuriously affect others. The principle that water may thus be diverted has been abundantly established by decisions of this Court." Citing, *Peck v. Bailey,* 8 Haw. 658; *Kahookiekie v. Keanini,* 8 Haw. 310; *Lonoaea v. Wailuku Sugar Co.,* 9 Haw. 651.

In the *Kahookiekie* case supra, the Court there said "Without deciding the question whether a water right by prescription to be used upon certain land could be diverted to and used upon another piece of land, we are of the opinion that to do this, as defendant has done, is a manifest injury to the plaintiff." *Supra* at 312.

In *Wong Leong v. Irvin,* 10 Haw. 265, 270-272 (1896), it is stated that insofar as the transfer of water from one *ahupuaa*[5] to another *ahupuaa* was concerned, it may be lawful either under the common law or by ancient Hawaiian usage. The Court reasoned that once a prescriptive right ripens into a superior right, other proprietors of the water should have no more concern in the use of the water.

> "So far as the argument rests upon Hawaiian usage, it is based on the statement that such transfers were not made in ancient times. But

[5]Largest unit of land divisions in the Hawaiian Land system.

> this is quite different from a statement that such transfers could not be made . . . . [W]e do not know as a fact that such transfers were never made in ancient times."

Thus, there came into existence a body of case law, erroneously decided, by the failure to consider an existing statute. But the impact of those decisions did not become crucial to the determination of water rights law until the Territory sought a definite ruling in later cases.

In *Territory v. Gay*, 31 Haw. 376 (1930), the Court decided the issue relating to the surplus of water not required for lower prescriptive or appurtenant rights. Three justices comprised the Supreme Court then and each gave separate opinions on the question presented. Chief Justice Perry said that save for one feature of the *Carter*[6] case relating to freshet waters:

> "[I]t is not and never has been the law in Hawaii. It (common-law doctrine of riparian rights) is utterly inconsistent with the system which from time immemorial has been recognized and enforced in these islands. Its adoption now with reference to normal surplus waters would alter established rights. * * * After a careful reexamination of all Hawaiian cases relating to water law I find none except the *Carter* case, *supra*, which makes any award of riparian rights as such." *Supra* at 396, 402.

Justice Parsons, concurring in part and dissenting in part, differed with the above opinion in the dis-

[6]*Carter v. Territory*, 24 Haw. 47 (1917).

approval of the *Carter* case, *supra*. He felt that the case was not necessary for determining the right of the respondents to continue to maintain the diversion of a part or all of the normal daily surplus of water.

> "In view of the fact that the right to surplus storm and freshet waters was directly in issue in the *Carter* case and of the fact that such right is not directly in issue in the case at bar, without expressing any view as to how the question should be ultimately determined I cannot concur in that portion of the opinion of the Chief Justice in the present case which, if concurred in, would overrule the *Carter* case in the particulars above set forth." *Supra* at 408.

Justice Banks in his dissenting opinion differed with the Chief Justice in the rule to be used concerning normal and storm surplus waters. He favored the adoption of the common law doctrine of riparian water rights and that the *Carter* case was not inconsistent and that the rule announced there was:

> "So inherently just in its regulation of the use of an element that is vital to the well being of mankind and is so consonant with natural rights and human necessities that I think it should be finally adopted as the law of this territory." *Supra* at 409.

Thus the three justices managed to agree that *Gay & Robinson* should have the "normal surplus waters" but the rule and justification for such a gift left the status of water rights law in limbo.

The Supreme Court of Hawaii in the instant case in reviewing the ruling in *Territory v. Gay* said that that decision was:

> ". . . made in a vacuum. Both the State and McBryde owning land abutting the Hanapepe River are entitled to riparian water rights over and above the appurtenant rights as determined by the trial court, and under the riparian doctrine they are entitled to the amount of flow of water in both the Koula Stream and Hanapepe River as water flowed in the stream and river at the time of the award without substantial diminution. In other words, they are entitled to have the flow of water in the Hanapepe River in the shape and size given it by nature. Thus, there can be no quantity of water which may be deemed 'normal daily surplus water' and Gay & Robinson is entitled to nothing under the ruling of that case."[7]

These decisions, from the *Peck* case *supra,* to the *Gay* case *supra,* never tried to reconcile the ancient Hawaiian water rights with riparian and appurtenant rights at common law, and Chapter 7, Hawaii Revised Statutes. The Supreme Court of Hawaii in the instant case clearly defined water rights law in view of said Chapter 7, which provides:

> "§7-1. *Building materials, water, etc.; landlords' titles subject to tenants' use.* Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking

[7]Decision (App. 91).

water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use."[8]

CONCLUSION

For the reasons stated above, the writ should be denied.

Dated, Honolulu, Hawaii,
May 23, 1974,

Respectfully submitted,
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[8]Decision (App. 83, 84), See Enactment of Further Principles enacted by the Hawaiian Government on August 6, 1850, Law 1850, p. 202, and Section 577 of Revised Laws of Hawaii 1925, which now appears as Section 7-1, Hawaii Revised Statutes.